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Supreme Court, U.S.
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No. 92-870

In The

Supreme Court of the United States

October Term, 1992

WILLIAM J. O'BRIEN,

Petitioner,

v.

CONSOLIDATED RAIL CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Questions Presented as set forth in the Petition for Writ of Certiorari are as follows:

I. Is the preemptive effect of the Railway Labor Act to be judged by the same standard set forth in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), which addressed preemption under the Labor Management Relations Act, or by a different standard?

II. Are state law claims of handicap discrimination more vulnerable to federal labor act preemption than state law claims of discrimination on the basis of race, sex, age, etc?

III. When, if ever, may labor unions, through the collective bargaining process, prospectively waive the State statutory rights of their members to be free from discrimination based on handicaps, race, sex, age, or other protected categories?

STATEMENT PURSUANT TO SUPREME COURT RULE 29.1

The respondent, Consolidated Rail Corporation, has no parent company. It has the following subsidiaries:

1. CRR Industries, Inc.
2. CG Projects, Inc.
3. Conrail Mercury, Inc.
4. CRR Credit Corp.
5. CRR Investment, Inc.
6. PD Land Services, Inc.
7. CRC Properties, Inc.
8. Merchants Despatch Transportation Corp.
9. Penn Central Communications Co.
10. St. Lawrence & Adirondack Railway Company
11. Indiana Harbor Belt Railroad Company
12. General American Insurance Company
13. Calumet Western Railway Company
14. Monongahela Railway Company
15. CG Lockport, Inc.
16. CR Quality Services, Inc.

Consolidated Rail Corporation has the following affiliates:

1. Akron & Barberton Belt Railroad Company
2. Albany Port Railroad Company
3. Belt Railway Company of Chicago
4. Chicago & Western Indiana Railway Company
5. Lakefront Dock & Railroad Terminal Company
6. Nicholas, Fayette & Greenbrier Railroad Company
7. Peoria & Pekin Union Railway Company

STATEMENT PURSUANT TO SUPREME COURT RULE 29.1 – Continued

8. Pittsburgh, Chartiers & Youghiogheny Railway Company
9. Transportation Data Xchange, Inc.
10. Trailer Train Company
11. CU Energy Partnership LP
12. Concord Resources Group
13. Peoria Midwest Transportation Corporation
14. Calpro Company
15. Railbox Company
16. Railgon Company
17. Railroad Assoc. Ins. LTD.
18. Concord Canada, Inc.
19. Land Acquisition Services, Inc.
20. Soretox, Inc.
21. Stablex Canada, Inc.
22. Stablex Filtration, Inc.
23. Incinerator Projects Joint Venture
24. New York Land Acquisition Services, Inc.
25. Black Hawk Development, Inc.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATEMENT PURSUANT TO SUPREME COURT RULE 29.1 ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 7

I. THE ISSUES PRESENTED BY THE PETITIONER IN HIS FIRST AND SECOND QUESTIONS FOR REVIEW WERE NEITHER RAISED NOR RESOLVED IN THE COURTS BELOW AND, THEREFORE, ARE NOT PROPERLY BEFORE THIS COURT 7

II. THE FIRST QUESTION PRESENTED BY THE PETITIONER FAILS TO DEMONSTRATE A CONFLICT IN THE CIRCUIT COURTS OF APPEALS AND, THEREFORE, DOES NOT SATISFY THE REQUIREMENTS FOR A GRANT OF CERTIORARI UNDER SUPREME COURT RULE 10.1(a). 10

TABLE OF CONTENTS – Continued

Page

III. THE SECOND QUESTION PRESENTED BY THE PETITIONER FAILS TO SATISFY THE REQUIREMENTS FOR A GRANT OF CERTIORARI UNDER EITHER SUPREME COURT RULE 10.1(a) OR RULE 10.1(c) 16

IV. THE THIRD QUESTION PRESENTED BY THE PETITIONER FAILS TO DEMONSTRATE A CONFLICT BETWEEN THE DECISION BELOW AND APPLICABLE DECISIONS OF THIS COURT AND, THEREFORE, DOES NOT SATISFY THE REQUIREMENTS FOR A GRANT OF CERTIORARI UNDER RULE 10.1(c). 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES:

Alexander v. Gardner-Denver Company, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974) 19

Allis-Chalmers Corp. v. Lueck, 471 U.S. 200, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985) 14

Beard v. Carrollton R.R., 893 F.2d 117 (6th Cir. 1989) 14

Colorado Anti-Discrimination Commission v. Continental Airlines, 372 U.S. 714, 83 S.Ct. 1022, 10 L.Ed.2d 84 (1963) 17

Davies v. American Airlines, Inc., 971 F.2d 463 (10th Cir. 1992) 7, 14, 15

Delta Air Lines, Inc. v. August, 450 U.S. 346, 101 S.Ct. 1146, 67 L.Ed.2d 287 (1981) 7

Duignan v. United States, 274 U.S. 195, 47 S.Ct. 566, 71 L.Ed. 996 (1927) 7

English v. General Electric Co., 496 U.S. 72, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990) 11

Espinosa v. Norfolk & Western Ry. Co., 750 F. Supp. 819 (E.D. Mich. 1990) 14

Hines v. Davidowitz, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941) 11

Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988) .... *passim*

Maher v. New Jersey Transit Rail Operation, Inc., 125 N.J. 455, 593 A.2d 750 (1991) 12

McCall v. Chesapeake & Ohio Ry. Co., 844 F.2d 294 (6th Cir. 1988) *cert. denied* 109 S.Ct. 196 (1988) 12, 15, 17

TABLE OF AUTHORITIES – Continued

Page

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985)..... 11

O'Brien v. Consolidated Rail Corp., 972 F.2d 1 (1st Cir. 1992) 12, 17

United States v. Ortiz, 422 U.S. 891, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975)..... 8

United States v. Williams, ___ U.S. ___, 112 S.Ct. 1735 (1992)..... 8

Youakim v. Miller, 425 U.S. 231, 96 S.Ct. 1399, 47 L.Ed.2d 701 (1976)..... 7

STATUTES:

United States Code

29 U.S.C. § 185 (§ 301 of the Labor Management Relations Act)..... 8

29 U.S.C. § 793 (§ 503 of the Rehabilitation Act of 1973)..... 5

45 U.S.C. §§ 151-163..... 8

45 U.S.C. § 184..... 2

Massachusetts General Laws

Mass. General Laws c. 151B 6

Mass. General Laws c. 151B, § 5..... 6

Code of Federal Regulations

41 CFR 60-741.26(g)..... 5

TABLE OF AUTHORITIES – Continued

Page

RULES:

Supreme Court Rule 10.1(a)..... 10, 15, 16, 18

Supreme Court Rule 10.1(c)..... 16, 17, 18, 20

MISCELLANEOUS:

13 *Moore's Federal Practice* ¶ 810.45 (2d ed. 1991) 20

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OPINIONS BELOW

The respondent accepts the citation of the opinions and judgments below as set forth in the petitioner's petition for writ of certiorari.

JURISDICTION

The petitioner would seek to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTORY PROVISIONS INVOLVED

The respondent accepts the petitioner's statement of statutory provisions involved with one exception. The petitioner's citation to 45 U.S.C. § 184 has no relevance to the present case. Section 184 refers exclusively to carriers by air and not railroads.

STATEMENT OF THE CASE

The petitioner, William J. O'Brien, who was born without a right hand, was hired by Consolidated Rail Corporation ("Conrail") on or about February 15, 1977 as a crew dispatcher in Boston, Massachusetts and was eventually promoted to Yardmaster. (Petition, p. A-2). In August, 1985, O'Brien applied for the position of stevedore[1] at Conrail's Framingham, Massachusetts location. Specifically, following a layoff, he sought to exercise his rights under the governing union contract to "bump" a less senior Conrail employee, who held a Framingham stevedore's position. (Petition, pp. A-2 to A-3). On that same date, the plaintiff was advised by J.M. Riley ("Riley"), the Conrail employee with supervisory responsibility over the Framingham stevedore operation, that O'Brien was disqualified for the stevedore position

[1] For Conrail, the job of stevedore in issue relates to the railroad's transportation of automobiles. Stevedores perform a variety of tasks including unchaining automobiles, driving automobiles off the railroad cars, opening railroad car doors, and raising multilevels, as well as climbing the metal ladders and handling the bridge plates.

because he was physically incapable of performing the duties of a stevedore. (Petition, p. A-3).

Following the disqualification, on September 9, 1985, O'Brien filed a claim for compensation under the governing union contract for working days lost as a stevedore since the date of his attempt to "bump" in August, 1985. (*See* Petition, p. A-4). O'Brien asserted his claim under Rule 59, the non-discrimination provision, of the governing collective bargaining agreement. (Petition, pp. A-4; D-20). That claim was denied by Riley in a letter dated September 16, 1985. Riley also advised the petitioner that his disqualification was agreed to by Dr. Hanson of the Conrail medical staff.

Approximately nine days later, on or about September 25, 1985 and at his request, the petitioner was given a field test in Framingham in order to allow O'Brien the opportunity to demonstrate his ability to perform the stevedore job. (*See* Petition, p. A-3). A committee of six, including Riley, Dr. Hanson (Conrail's Regional Medical Director) and other Conrail employees from the Labor Relations office, was present at the field test. (*See* Petition, p. A-3).

As a result of the field test, Conrail concluded that O'Brien was not qualified to perform the stevedore job. Specifically, Conrail determined that O'Brien would not be able to climb ladders safely under snow and ice conditions and would not be able to handle 40-pound bridge plates used in the stevedore operation. (Petition, pp. A-3 to A-4). As a result, Conrail determined that the petitioner's performance would present a safety hazard both to O'Brien and his fellow Conrail employees.

Following these events, the petitioner pursued two courses of action. First, O'Brien continued to seek relief through his union and the collective bargaining agreement's grievance procedure. (Petition, p. A-4). Second, O'Brien filed a complaint of discrimination in employment with the Office of Federal Contract Compliance Programs ("the OFCCP"). (Petition, p. A-5).

With respect to the grievance procedure under the governing collective bargaining agreement, the petitioner's discrimination claim was progressed by the union to the Manager-Labor Relations on October 15, 1985 and was denied by letter dated January 10, 1986. (*See* Petition, p. A-4). Following this, the union and Conrail formulated a Joint Submission to further advance the petitioner's claim to the Senior Director-Labor Relations, Conrail's highest appellate officer. The Senior Director-Labor Relations, G.F. Bent, denied O'Brien's claim by letter dated August 11, 1986, finding that the non-discrimination provision of the collective bargaining agreement was not violated. (*See* Petition, p. A-4).

Approximately one year later, by letter dated August 9, 1987, the petitioner served notice of his intention to file a submission with the National Railroad Adjustment Board, Third Division ("the NRAB"), "covering an unadjusted dispute between me and Conrail involving the question of discrimination in covering the position of stevedore in Framingham, Massachusetts." In two submissions to the NRAB, the petitioner asserted his claim of handicap discrimination against Conrail.

On June 29, 1989, the NRAB issued an Award and Order, denying the petitioner's discrimination claim and

finding the absence of substantial probative evidence to meet the petitioner's burden of overcoming Conrail's finding of insufficient qualifications for the stevedore position. (Petition, pp. E-1 to E-6). In conclusion, the NRAB found no "proof of record" of a "Carrier violation of Agreement provisions." (Petition, p. E-6).

In addition to the grievance procedures under the collective bargaining agreement and involving the NRAB, the petitioner simultaneously was pursuing a claim with the OFCCP, having filed a Complaint of Discrimination in Employment on or about December 2, 1985. Among other things, O'Brien asserted that Conrail made no accommodations to employ him as a stevedore.

The OFCCP issued its Notification of Results of Investigation on May 22, 1986, concluding that Conrail "did not violate its obligations under the nondiscrimination and affirmative action provisions of Section 503, as amended [29 U.S.C. § 793]." (*See* Petition, p. A-5). By letter dated June 17, 1986, the petitioner requested review of the OFCCP's decision to the Director of the OFCCP pursuant to 41 CFR 60-741.26(g). The Director denied O'Brien's request for reconsideration by letter dated on or about June 10, 1988. (*See* Petition, p. A-5).

On January 8, 1988, while the petitioner's discrimination claim was pending before the NRAB and while that same claim was pending reconsideration before the Director of the OFCCP, the petitioner was again notified of a layoff; and he again sought to exercise his "bumping" rights for the stevedore's position. (Petition, p. A-5).

Before his request was denied by Conrail, the petitioner filed a complaint with the Massachusetts Commission Against Discrimination ("the MCAD") on March 14, 1988. (Petition, p. A-6). On October 6, 1988, the MCAD assented to the petitioner's request to remove his action from the MCAD to allow the filing of a civil action in court. (Petition, p. A-7).

The plaintiff commenced the present action in Massachusetts Superior Court, Suffolk County, Civil Action No. 88-6010-E, on October 20, 1988. Subsequently, on November 17, 1988, Conrail filed a timely petition to remove the action to the United States District Court for the District of Massachusetts; and that petition was allowed by the court on December 2, 1988. (*See* Petition, pp. A-7 to A-8).

In essence, the petitioner alleged that Conrail discriminated against him on account of his physical handicap by refusing O'Brien's request to move into the position of stevedore by exercising his rights under the governing union contract to "bump" a less senior Conrail employee in violation of Massachusetts General Laws c. 151B. (Petition, pp. A-6 to A-7).

Subsequently, Conrail filed a motion for summary judgment, asserting that Conrail was entitled to a judgment as a matter of law on the grounds of: (1) preemption under the Railway Labor Act; (2) preemption under Section 503 of the Rehabilitation Act of 1973; (3) issue preclusion as the result of the petitioner's proceeding before the NRAB; (4) issue preclusion as the result of the proceeding before the OFCCP; and (5) the six-month statute of limitations found in Massachusetts General Laws c. 151B, § 5. (Petition, p. A-8).

In her Report and Recommendation, United States Magistrate Marianne Bowler recommended that Conrail's motion be granted on all of the asserted grounds except the statute of limitations. (Petition, pp. A-9; B-1 to B-39). The District Court (Young, J.) approved the Report and Recommendation; and a judgment was entered in favor of Conrail. (Petition, pp. A-9; C-1 to C-3).

On appeal, Conrail argued that the judgment in its favor should be affirmed on all of the grounds presented to the District Court on its motion for summary judgment. Addressing only the question of preemption under the Railway Labor Act, the United States Court of Appeals for the First Circuit affirmed the judgment of the District Court. (Petition, pp. A-1 to A-27).

REASONS FOR DENYING THE WRIT

I. THE ISSUES PRESENTED BY THE PETITIONER IN HIS FIRST AND SECOND QUESTIONS FOR REVIEW WERE NEITHER RAISED NOR RESOLVED IN THE COURTS BELOW AND, THEREFORE, ARE NOT PROPERLY BEFORE THIS COURT.

This Court has consistently stated that "[o]rdinarily, [it] does not decide questions not raised or resolved in the lower court. . . . 'It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed'." *Youakim v. Miller*, 425 U.S. 231, 234, 96 S.Ct. 1399, 1401, 47 L.Ed.2d 701 (1976), *quoting from Duignan v. United States*, 274 U.S. 195, 200, 47 S.Ct. 566, 568, 71 L.Ed. 996, 1000 (1927); *Delta Air Lines*,

Inc. v. August, 450 U.S. 346, 362, 101 S.Ct. 1146, 1155, 67 L.Ed.2d 287 (1981) (although raised in petition for certiorari, issue not raised in the Court of Appeals "is not properly before us"); *United States v. Ortiz*, 422 U.S. 891, 898, 95 S.Ct. 2585, 2589, 45 L.Ed.2d 623 (1975) (same); *United States v. Williams*, ___ U.S. ___, 112 S.Ct. 1735, 1738 (1992) ("Our traditional rule . . . precludes a grant of certiorari only when 'the question presented was not pressed or passed upon below' ").

In the first question presented here, (Petition, p. i), the petitioner argues that there is a conflict in the circuits as to whether preemption under the Railway Labor Act, 45 U.S.C. §§ 151-163 ("the RLA"), is governed by the standard set forth by this Court in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988), with respect to preemption under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 ("the LMRA"). (Petition, pp. 12-25).

Assuming for the sake of argument alone that it is proper to speak in terms of a conflict on this point, *but see* Section II, *below*, the petitioner never raised the question which he now seeks to have reviewed in either the District Court or the Court of Appeals. More particularly, the petitioner asks this Court to consider an alleged circuit conflict and to decide that the LMRA preemption standard set forth in *Lingle, supra*, applies to preemption under the RLA as well. However, the petitioner never cited *Lingle* to the lower courts and never argued that the proper standard for RLA preemption was set forth in *Lingle, supra*.

Therefore, this Court should refuse to review the first question presented for the simple reason that the question was never raised by the petitioner below and no exceptional circumstances exist to justify the Court's departure from its traditional rule.

In the second question presented here (Petition, p. i), the petitioner raises the issue of whether state law handicap discrimination claims are "more vulnerable to federal labor act preemption" than other types of discrimination claims. In amplifying on this question, the petitioner argues that the decision of the Court of Appeals in this case: (1) conflicts with Ninth Circuit decisions as to the preemption of handicap discrimination claims under the LMRA; and (2) creates confusion as to the types of discrimination claims which are *not* preempted by the RLA. (Petition, pp. 25-34).

In pursuing the former point, the petitioner seeks to raise an issue broader than RLA preemption, i.e., "federal labor act preemption," and argues the existence of a conflict based upon differing decisions on the preemption of state law handicap discrimination claims under the RLA and the LMRA. (Petition, pp. 32-34). However, the petitioner never urged this point in the courts below and never cited the Ninth Circuit LMRA cases in his briefs. Indeed, the petitioner has not previously raised the preemption treatment of state law handicap discrimination cases under the LMRA.

As to the latter point, the petitioner argues that, for preemption purposes, the elements of handicap discrimination claims cannot be distinguished from the elements of other unlawful bases of discrimination. (Petition, pp.

25-32). Again, the petitioner never pursued this argument in the courts below in seeking to avoid the preemption of his state law handicap discrimination claim under the RLA.

Therefore, the Court should also refuse to review the second question presented on the ground that the question was never raised by the petitioner below and no exceptional circumstances exist to justify the Court's departure from its traditional rule.

For all of the foregoing reasons, the respondent submits that review should be denied as to the first and second questions presented in the petition for certiorari.

II. THE FIRST QUESTION PRESENTED BY THE PETITIONER FAILS TO DEMONSTRATE A CONFLICT IN THE CIRCUIT COURTS OF APPEALS AND, THEREFORE, DOES NOT SATISFY THE REQUIREMENTS FOR A GRANT OF CERTIORARI UNDER SUPREME COURT RULE 10.1(a).

In his first question presented, the petitioner asks this Court to determine whether preemption under the RLA is governed by the same standard which this Court has established for preemption under the LMRA in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988). (Petition, p. i). Basing his request for certiorari on Supreme Court Rule 10.1(a), the petitioner asserts that there is a conflict in the circuits as to the applicability of *Lingle* to claims of preemption under the RLA. (Petition, pp. 12-25). The respondent

submits that the petitioner has failed to identify a genuine circuit conflict which can support the grant of a petition for certiorari.

It is axiomatic that "[i]n deciding whether a federal law preempts a state statute, [the Court's] task is to ascertain Congress' intent in enacting the federal statute in issue." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 738, 105 S.Ct. 2380, 2388, 85 L.Ed.2d 728 (1985); *English v. General Electric Co.*, 496 U.S. 72, 110 S.Ct. 2270, 2275, 110 L.Ed.2d 65 (1990).

Therefore, the issue of the preemptive effect of any particular federal statute creates a unique and distinctive question. As this Court stated in *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941),

> There is not – and from the very nature of the problem there cannot be – any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. . . . In the final analysis there can be no crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case, [the state law in issue] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.
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> . . .
>
> The nature of the power exerted by Congress, the object sought to be obtained, and the character of the obligations imposed by the law, are all important in considering the question of

> whether supreme federal enactments preclude enforcement of state laws on the same subject.

Id., 312 U.S. at 67, 70, 61 S.Ct. at 401, 403.

In light of these principles, the question of the preemptive effect of the RLA with respect to state law claims of handicap discrimination presents a unique question for the courts. It presents a question separate and distinct from the preemptive effect of the LMRA which was addressed in *Lingle*. Therefore, *Lingle* does not and cannot, by definition, apply directly to the question of RLA preemption. As a result, it is misleading to speak of a conflict in the circuits as to the proper application of *Lingle* to RLA preemption.[2]

Rather, the only question conceivably before this Court is whether, as to the proper standard to govern RLA preemption, there is a conflict in the circuits. However, the petitioner has identified no conflict in the circuits and no conflict between the First Circuit's decision and that of any state court of last resort as to the proper standard to govern RLA preemption, particularly with respect to a state law claim of handicap discrimination. Indeed, the federal circuits and the highest state courts are in agreement that such claims are preempted. *O'Brien v. Consolidated Rail Corp.*, 972 F.2d 1 (1st Cir. 1992); *McCall v. Chesapeake & Ohio Ry. Co.*, 844 F.2d 294 (6th Cir. 1988) *cert. denied*, 109 S.Ct. 196 (1988); *Maher v. New Jersey*

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[2] Put another way, the petitioner's argument that there is a circuit conflict "regarding the comparative preemptive effect of the LMRA and RLA," (Petition, p. 17), raises a non-issue. "Comparative preemptive effect" is, at best, a matter of intellectual interest. It has no relevance to the case before the Court.

Transit Rail Operation, Inc., 125 N.J. 455, 593 A.2d 750 (1991).[3]

In addition, even as to the broader, more abstract question of some general standard for RLA preemption apart from the consideration of any particular type of state law claim, the petitioner has demonstrated no conflict in the circuits. Rather, the petitioner has simply asserted that the Circuit Courts of Appeals have taken different approaches to the incorporation of the LMRA preemption standard set forth in *Lingle* into the analysis of RLA preemption. (Petition, pp. 16-22).

As noted above, *Lingle*, by definition, does not supply the standard for RLA preemption; and, therefore, any variations in the application of the teachings of *Lingle* by the Circuit Courts of Appeals on questions of RLA preemption cannot *per se* create a conflict if there are no ultimate, conflicting results in the RLA decisions of the circuits.

Moreover, even assuming for the sake of argument alone that the application of the *Lingle* standard is pertinent to the question of a circuit conflict on RLA preemption, the petitioner's effort to identify "at least three different trends" in the circuit courts, (*see* Petition, pp. 16-22), is strained at best. A review of the decisions from

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[3] It is also perhaps worth noting, as pointed out in the Petition itself, that there is no conflict in the circuits as to how LMRA preemption applies to state law handicap discrimination claims. (Petition, p. 15). In addition, there is, as a result, a consistency among the circuits that RLA preemption and LMRA preemption lead to different results with respect to state law claims of handicap discrimination.

the various circuits cited by the petitioner reveals that all of the circuit courts look to LMRA preemption cases, *e.g.*, *Lingle* and *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 200, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985), for some guidance on the issue of RLA preemption. Although the language of the decisions may vary, the central point is that all of the courts find the LMRA preemption cases, including *Lingle*, instructive; and none of them has held *Lingle* to be dispositive of the RLA preemption question in every circumstance.[4] In other words, no circuit has completely rejected the relevance of LMRA cases to the question of RLA preemption; and no circuit has adopted the LMRA cases, including *Lingle*, as applicable in all cases to RLA preemption.[5]

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[4] The petitioner cites to three decisions for the proposition that *Lingle* controls under both the LMRA and the RLA. (Petition, p. 19). However, the two opinions cited from the Seventh Circuit predate *Lingle*; and the Tenth Circuit's opinion more properly reflects the view that it is appropriate for the court to look to LMRA cases for guidance as to preemption under the RLA. *Davies v. American Airlines, Inc.*, 971 F.2d 463, 466 (10th Cir. 1992). *Davies* does not preclude the possibility that, in a particular case, RLA preemption might be broader than LMRA preemption.

[5] The weakness in the petitioner's effort to maintain the existence of "three different trends" in the circuit courts is demonstrated by how easily decisions can be construed to fall into one "trend" or another. For example, the petitioner cites decisions from the Sixth Circuit as falling within two different "trends." *Espinosa v. Norfolk & Western Ry. Co.*, 750 F. Supp. 819 (E.D. Mich. 1990) (proposition: RLA has more preemptive effect than LMRA), and *Beard v. Carrollton R.R.*, 893 F.2d 117 (6th Cir. 1989) (proposition: *Lingle* is "instructive"). Moreover, an argument can certainly be made that another Sixth Circuit decision

In sum, the petitioner has failed to demonstrate the existence of a conflict in the circuits on any question relating to the proper standard for preemption under the RLA.

Beyond the issue of the existence of a conflict it is also worth noting that the ultimate result the petitioner seeks on his first question presented is presumably a holding that *Lingle* applies to the issue of RLA preemption of his Massachusetts state law handicap discrimination claim. However, the First Circuit in this case clearly looked to the LMRA preemption standard in *Lingle* as a foundation for its analysis of the petitioner's claim. (Petition, pp. A-13 to A-20). Therefore, the petitioner's complaint is ultimately with the First Circuit's application of that standard to the facts of the present case (*see* Petition, pp. 21-25). However, that complaint provides no basis for the grant of certiorari.

For all of the foregoing reasons, the petitioner has failed to set forth an adequate ground for the grant of certiorari under Supreme Court Rule 10.1(a) as to the first question presented.

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applied *Lingle* as if it governed RLA cases. *McCall v. Chesapeake & Ohio Ry. Co.*, 844 F.2d 294, 304 (6th Cir. 1988) (on rehearing).

Similarly, if one accepts the petitioner's insistence on the existence of three separate and distinct "trends," one must question the Tenth Circuit's decision in *Davies v. American Airlines, Inc.*, 971 F.2d 463 (10th Cir. 1992), where, in support of its RLA preemption position, the court cites at least one case from each of the petitioner's asserted "trends." *Id.* at 466-467.

Finally, the petitioner finds each of his three "trends" in the First Circuit's decision in this case (*see* Petition, pp. 21-22, 32).

III. THE SECOND QUESTION PRESENTED BY THE PETITIONER FAILS TO SATISFY THE REQUIREMENTS FOR A GRANT OF CERTIORARI UNDER EITHER SUPREME COURT RULE 10.1(a) OR RULE 10.1(c).

In his second question presented, the petitioner asks this Court to determine whether state law claims of handicap discrimination are "more vulnerable to federal labor act preemption than state law claims of discrimination on the basis of race, sex, age, etc." (Petition, p. i). Basing this request on Supreme Court Rules 10.1(a) and 10.1(c), (Petition, p. 34), the petitioner apparently asserts that: (1) there is a conflict in the decisions of the First and Ninth Circuits; and (2) the First Circuit "has decided an important question of federal law which has not been, but should be, settled by this Court." (*See* Supreme Court Rules 10.1(a) and 10.1(c)).

As to the first point, the petitioner seeks to manufacture a conflict by broadening his question beyond RLA preemption, which is the proper focus of this petition, to encompass "federal labor act preemption." (Petition, p. i). Once broadened, the petitioner then asserts a conflict between the First Circuit's RLA preemption decision in this case and two Ninth Circuit LMRA preemption decisions involving state law claims of handicap discrimination. (Petition, pp. 32-34). However, as demonstrated in Section II, *above*, RLA preemption and LMRA preemption ultimately involve distinct and independent inquiries regardless of any similarities between the two issues; and it is simply improper to speak of a conflict in the circuits based on preemption decisions under two different federal statutes. Therefore, the petitioner's efforts to bring

RLA preemption and LMRA preemption together as a single issue of "federal labor act" preemption should be rejected.

As to the second point, in seeking review under Supreme Court Rule 10.1(c), the petitioner argues that the First Circuit in this case and the Sixth Circuit in *McCall, supra*, have created "confusion" as to the preemption of state law discrimination claims and rendered decisions which "threaten[] preemption of all state law discrimination claims." (Petition, pp. 25-32).

However, the "confusion" and "threat" which the petitioner perceives are wholly illusory in light of this Court's decision in *Colorado Anti-Discrimination Commission v. Continental Airlines*, 372 U.S. 714, 83 S.Ct. 1022, 10 L.Ed.2d 84 (1963), which squarely prohibits the perceived "threat," i.e., RLA preemption of all state law discrimination claims. Moreover, both the First and Sixth Circuits have clearly traced, for preemption purposes, the lines of distinction between a handicap discrimination claim on the one hand and other types of discrimination claims on the other hand. *McCall, supra* at 302-303; *O'Brien v. Consolidated Rail Corp., supra* at 5-6; (Petition, pp. A-24 to A-26). Therefore, there is also no "confusion" as to the scope of RLA preemption with respect to state law discrimination claims.[6] In sum, the petitioner has failed to demonstrate

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[6] The petitioner challenges the correctness of the First and Sixth Circuits' analysis finding a distinction between handicap discrimination claims and other types of discrimination claims. (Petition, pp. 28-31). Without endeavoring to demonstrate the appropriateness of the two courts' analysis, suffice it to say at this point that the petitioner's dispute with the courts' reasoning does not create the basis for a grant of certiorari in this case.

any federal question which should be settled by this Court.

For all of the foregoing reasons, the petitioner has failed to set forth an adequate ground for the grant of certiorari under either Supreme Court Rule 10.1(a) or Rule 10.1(c) as to the second question presented.

IV. THE THIRD QUESTION PRESENTED BY THE PETITIONER FAILS TO DEMONSTRATE A CONFLICT BETWEEN THE DECISION BELOW AND APPLICABLE DECISIONS OF THIS COURT AND, THEREFORE, DOES NOT SATISFY THE REQUIREMENTS FOR A GRANT OF CERTIORARI UNDER RULE 10.1(c).

In his third question presented, the petitioner asks this Court to determine the scope of a union's power to prospectively waive its members' state statutory rights "to be free from discrimination based on handicaps, race, sex, age, or other protected categories." (Petition, p. i). Basing his request on Supreme Court Rule 10.1(c), the petitioner asserts that the First Circuit's decision conflicts with the reasoning of prior decisions of this Court. (Petition, pp. 34-47). The respondent submits that the petitioner has raised a question which has no relevance to the present case and, moreover, has demonstrated no conflict with this Court's decisions.

The present case concerns whether state law handicap discrimination claims are preempted under the RLA in light of the Congressional intent as demonstrated by the scope of the federal RLA statutory scheme. If the petitioner's claim is preempted, that result is dictated by

Congress and not by any action of the petitioner's labor union. As a result, the question of whether the union may waive its members' individual state-law rights is "a question distinct from that of whether a claim is pre-empted. . . . " *Lingle, supra,* 486 U.S. at 409 n.9, 108 S.Ct. at 1883 n.9. Therefore, the First Circuit quite properly never addressed the issue of waiver in this case where the question was preemption and the respondent, Conrail, never argued that the petitioner had waived any right he may have had to pursue his state law claim.

Just as clearly, the petitioner's attempted reliance on *Alexander v. Gardner-Denver Company,* 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974), is misplaced because *Gardner-Denver* was not a preemption case and because, in *Gardner-Denver,* the employer had argued that the employee had prospectively waived his federal Title VII discrimination claim in the governing collective bargaining agreement. *Id.,* 415 U.S. at 51-54, 94 S.Ct. at 1021-1022. *Gardner-Denver* speaks clearly to the issue of waiver; however, that issue is simply irrelevant to the present case where the court held that Congressional intent as expressed in the RLA required preemption of the petitioner's state law claim.

Once it is determined that the present case involves preemption and does not concern the prospective waiver of employees' statutory rights, it becomes clear that there is, by definition, no conflict between the decision below in this case and any decision of this Court addressing the waiver issue.[7]

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[7] From his argument, it seems clear that the petitioner also seeks to meld together the questions of waiver and preemption,

Finally, as one commentator has noted,

> The mere assertion of conflict with Supreme Court precedent will not suffice. Rule 10 requires that the application of the precedent to the case at bar be clear,[5] and that the . . . federal court of appeals, did not follow that precedent.

13 Moore's Federal Practice 810.45, p. SC10-51 and n.5 (2d ed. 1991). The petitioner has clearly failed to allege such a conflict and, therefore, there is no basis for a grant of certiorari under Supreme Court Rule 10.1(c) as to the third question presented.

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suggesting that concerns about waiver should inform the courts' decisions about preemption. (Petition, pp. 34-37). However, such an analysis, in fact, conflicts with this Court's determination that waiver and preemption are distinct issues. *Lingle, supra*, 486 U.S. at 409 n.9, 108 S.Ct. at 1883 n.9. Moreover, the petitioner certainly does not dispute the proposition that RLA preemption applies at least where a state law claim requires interpretation of the governing collective bargaining agreement. However, such an analysis means that there is an agreement provision to be interpreted; that the provision was bargained for by the union; and that the existence of the provision results in a valid finding of preemption. Under the petitioner's analysis, this would presumably also be an unacceptable prospective waiver, invalidating preemption. In short, the petitioner's reasoning proves too much; conflicts with settled preemption case law; and cannot stand.

CONCLUSION

For all of the foregoing reasons, the respondent, Consolidated Rail Corporation, respectfully requests that William J. O'Brien's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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